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October 7, 2008

Massachusetts Department of Energy Resources
100 Cambridge Street
Boston, MA 02110

Re: Reply Comments on the Feasibility of Compliance with RPS-related Import Provisions of the Green Communities Act, Section 105 of Chapter 169 of Acts of 2008 (the "GCA").

Dear Sirs/Madams:

Cape Wind Associates, LLC ("CWA") hereby offers its reply comments regarding the feasibility of compliance with the two import-related provisions of Section 105 of the Green Communities Act. As discussed below, none of the essential points of our initial comments are rebutted by other initial filings. While certain parties argue that compliance would be inconvenient or more burdensome than non-compliance, they tend to fall back upon the generalized assertion that the Commonwealth would thereby be unable to fulfill its renewable targets, with resulting price impacts. Such proposition, however, is fully rebutted by the factual conclusion of the Navigant Report, the most current independent evaluation, conducted on behalf of the Commonwealth, as cited in our initial comments. Further, it is notable that many of the parties opposing the implementation of Section 105 take the directly opposing view when the very same issues arise in the adjacent control areas, where their primary commercial interests lie. Finally, none of the cited authorities by opponents of Section 105 respecting the Commerce Clause considered state-sponsored and non-prohibitive incentive programs of the type in question, distinctions based upon the non-political boundaries of an electrical control area, or state oversight of the physical location of utility infrastructure facilities.

I. **Many of the Opponents of Section 105(c) take the Directly Opposing View in Adjacent Control Areas, when their Own Commercial Interests are at Stake, and their Opposition Should be Evaluated Accordingly.**

As an initial matter, the Department must take notice of the fact that many of the opponents of Section 105(c) in fact support similar and more restrictive provisions regarding the eligibility of imports for state-sponsored programs in the adjacent control areas, where their own commercial interests would be affected. Most obviously, and as previously cited, Hydro Quebec and the province of Quebec openly and prominently acknowledge that their programs are designed to incentivize the location of renewable generation and manufacturing infrastructure only within the province and to meet domestic energy needs, with absolutely no allowance for import participation. Initial Comments at 4-6.

Other parties with commercial interests in New York oppose Section 105(c), yet expressly advocate that New York fashion its incentive programs so as to favor their locally-sited projects, rather than to rely upon imports. In particular, the Order of the NYPSC cited in our Initial Comments (Case 03-E-0188) noted the position of the Alliance for Clean Energy New York ("ACE", whose members include, with relevance to this proceeding, Brookfield Renewable Power, Iberdrola Renewables, Horizon Wind Energy, Shell Wind, and the Union of Concerned Scientists) which called for New York's renewable incentive program to include evaluation factors designed to favor in-state projects over imports, as follows:

> <u>ACE, NRDC, and the AG state that economic development benefits to New York should account for at least one-half of the bid evaluation criteria</u>. These parties, along with Community, Environmental Advocates, and the Farm Bureau, assert that, in contrast to out-of-state projects, in-state projects help support local businesses, assist rural landowners in maintaining farms and open space, and provide much-needed tax or payment-in-lieu-of taxes (PILOT) financial support to towns, counties, and school districts. Horizon argues that its wind projects have resulted in significant economic benefits (more than $10/MWh) within a defined region of the State from the payment of land royalties, new construction and operating jobs, PILOT payments and the purchase of local goods and services. In addition, the commentators agree, these benefits may extend beyond the RPS Program contract term, <u>unlike the in-state benefits derived from out-of-state Projects, which would likely provide little energy, economic or environmental benefits to New York after the end of the contract term</u>.

NYPSC Order 03-E-0188, Order 18, 2006, pp. 13-14 (emphasis added). More specifically, ACE's comments in such proceeding, filed jointly with the NRDC, advocated express preferences for renewable projects within New York (<u>i.e.</u>, "Economic development benefits to New York should account for at least one-half of the evaluation criteria") because of the in-state benefits of economic development, long-term energy reliability and price stability for New York ratepayers, as follows:

> At the expiration of the contract for renewable energy attributes, however, an in-State project will continue to provide stable-priced power within New York (as it is generated) and income to the local community, while an out-of-State project will provide neither. In-state projects provide significant job and tax benefits to local communities.
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> The target of the RPS is to raise the amount of renewable energy sold in New York State to 25% by 2013 (to match an historic high). If out-of-state projects are awarded RPS program funds, once those contracts expire New York will have no rights to claim the renewable power they produce. Therefore, it is highly likely that the amount of renewable energy in New York's energy portfolio will once again fall, in turn requiring additional investment in renewable energy project development. However, if the funds are used to support in-State projects, there is a much greater likelihood that the power will remain in New York's market and continue to help maintain or increase the level of renewable power used in New York.
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> <u>To summarize, ACE NY and NRDC urge the Commission to ensure that projects winning RPS program support provide in-state economic development benefits and contribute to long-term energy security and price stability for New Yorkers</u> and that a level playing field is created for in-state and out-of-state renewable energy projects. We feel the Commission can accomplish the goals of the RPS by encouraging NYSERDA to ensure evaluation of bidders including leveling the playing field and making in-State economic development benefits at least half of the evaluation criteria used.

Supplemental Comments of ACE and NRDC, Case 03-E-1088 (September 11, 2006), pp. 6, 9-10. Moreover, in their reply comments in such proceedings, ACE and NRDC again expressly stressed the reliability-related advantages of incentiving in-state renewable generation versus the reliance on imports, particularly during peak periods:

> Horizon Wind Energy's comments state that the Maple Ridge Wind Farm was operating at over 50% capacity during the recent peak power usages in New York on August 1 and August 2, 2006. This illustrates that in-State projects not only provide the economic and energy security benefits discussed in our previous comments, but that they also can contribute significantly to our in-State capacity (and ancillary grid support) when it is needed most. Weather patterns are geographically large in scope. Therefore, when New Yorkers face a peak energy use period such as hot, summer days or when natural gas supplies for electricity production are tight (and expensive) on cold, winter days, New York's neighbors are facing the same situation and imports into the New York energy market will be strained. This is clearly another reason to value in-State projects.

Reply Comments of ACE NY and NRDC, September 11, 2006, pp. 2-3.

The individually-submitted comments of New York renewable producers in such proceeding further undermine the credibility of their current position that Section 105(c) is somehow unfair, unduly burdensome, or unconstitutional. For example, Horizon Wind Energy, while now opposing Section 105(c), took the directly opposing view before the NYPSC by arguing that "The intended environmental and economic benefits of the RPS can only inure to the citizens of New York State if the RPS encourages the development of in-state renewable generation." Horizon Reply Comments on SAPA03-E-0188SA16, p.1. Horizon went on to emphasize the economic development benefits to New York of its Maple Ridge Wind Farm, and urged the Commission "to select evaluation criteria that acknowledge the tremendous economic benefits of RPS implementation by projects within the state of New York" and, moreover, that "the procurement process should acknowledge that out-of-state projects bring few overall benefits to the citizens of New York state." Id. at 4. In its initial comments, Horizon further maintained that the advantages of in-state renewable projects "are so compelling that it would certainly make sense for the State not to have to import RECs" and that "the interests of the citizens, business and rate-payers of New York would be best served by NYSERDA contracting with New York-based renewable energy generators to the extent possible." Initial Comments of Horizon, at 4, 6.

First Wind, formally known as UPC, in its individual comments to the NYPSC similarly argued for preference for in-state projects, as well as endorsing the position of public interest organizations of the Renewable Energy and Environment Coalition ("RETEC") that imports be allowed to participate in New York incentive programs only if the exporting control area has in place reciprocal renewable incentive programs:

> UPC strongly agrees with RETEC's comments on imports. Imports should only be allowed with the exporting states as reciprocal rules in placing in-state policies in support of renewables. However, UPC would like to note that wind power adds significant economic benefits to the municipality and regions where it is sited.

UPC Comments, Case 03-E-1088, November 4, 2005. Further, as the NYPSC noted, Brookfield took an even stronger position and urged an absolute cap upon program participation by imports:

> Brookfield urges the Commission to cap out-of-state resources at a maximum of 20% of the total renewable energy supply to help further the development of in-state renewable energy generation and the retention of the associated economic development benefits in New York.

NYPSC Order 03-E-0188, p.13. Thus, the opposition of such commercial parties to Section 105(c) must be considered accordingly. When their own commercial interests were more directly at stake, such parties expressly urged the adoption of more geographically restrictive eligibility conditions, thereby recognizing the legitimate state authority over the physical location of utility infrastructure facilities, as well as the reliability and economic benefits of locally-sited generation, with no apparent concerns over interstate commerce issues.

Most importantly, however, the breadth of interests supporting such positions in the neighboring jurisdiction negates the suggestion that Section 105(c) somehow represents an improperly narrow, parochial or purely commercial view. Indeed, the fundamental rationale of CWA for implementing Section 105(c) was shared, not only by the commercial competitors listed above, but by an array of public interest entities, including the NRDC and RETEC, whose members include the New York Public Research Group, the Pace Energy Project, and the Sierra Club Atlantic Chapter. Thus, the Massachusetts Legislature in advancing the provision of Section 105(c) acted in a manner consistent with the positions of out-of-state commercial parties when their own interests are at stake, and consistent with the views of a broad coalition of environmental, energy and consumer public advocacy organizations participating in the New York proceedings.

II. There Has Been No Showing That Implementing Section 105(c) Would Not Be "Feasible."

None of the comments indicate that compliance with Section 105(c) is not "feasible" within the meaning of the legislative language. In addition to the rationale set forth in our initial comments, the Department should reference the comments of Ridgewood, which set forth the best discussion of the case law interpreting the term "feasible" in comparable statutory usage, and holding that feasibility indeed means "capable of being done," rather than "desirable" in light of an administrative cost-benefit analysis of the type proposed by virtually every opponent of Section 105(c). See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). In accordance with the cited Supreme Court authorities, the cost-benefit balancing arguments of the opponents cannot be not sustained.

Ultimately the "feasibility" arguments of the opponents of Section 105(c) fall back upon the only non-subjective rationale of their position, the assertion that Massachusetts would fall short of meeting its renewable goals, with the resulting impact of upward pressure upon renewable prices. The compelling reality, however, is that such assertion is entirely rebutted by the most recent and independent analysis. Navigant's report entitled Potential for Renewable Energy Development in Massachusetts, as prepared for the Commonwealth to address the very point in questions, was released the during the pendency of this proceeding and constitutes the most recent and reliable evaluation. Indeed, the unbiased conclusion of such report is that regional renewable resources will be "more than sufficient to meet our RPS requirements in 2020 at current loads." Related claims as to shortage-related prices should be discounted accordingly, with specific recognition of the fact that the cost of RPS compliance has already been carefully mitigated through the price ceiling effect of the Alternative Compliance Payment (which was appropriately designed to approximate the forecasted incremental revenue required by marginal RPS units.) In any event, the actual cost of compliance will be determined by market forces that are difficult to predict, making the alarmist forecasts of the opponents speculative, at best, and not a matter of objective "feasibility."

It is also noteworthy that several of the opponents of Section 105(c) argue that compliance is not "feasible" for certain remotely-located generators because of the physical shortage of available transmission facilities. See, Boralax at 3 ("there are limitations on the firm transfer capability into ISO-NE"), Brookfield at 8 ("the amount of capacity that could be sold over a given interconnection is limited"), and Shell at 5 ("suppliers that are located outside New England may not be able to obtain sufficient capacity import rights"). Such comments, however, in fact demonstrate the legitimate reliability concerns addressed by the Legislature that arise from physical constraints, rather any sense of improper protectionism. In this regard, the Department has from the outset of the RPS program confirmed that the obligation and cost to remotely-located generators of delivering their product to this market are a fundamental part of business, and not a barrier to entry:

> Units located outside of New England will incur costs to deliver any New Renewable Generation attributes to this region. <u>The cost of transmitting electricity from a distant location is an inherent cost of doing business and not a barrier to entry</u>.

Department Order of February 6, 2002, p.8 (emphasis added). Thus, the real-world difficulties occasioned by a particular generator's choice of location are a self-imposed condition that must be overcome in the normal course of business, and are by no means an improper regulatory impediment to participation in the incentive programs of this jurisdiction, or an objective measure of program feasibility.

The comments also do not rebut the fact that, notwithstanding the objections of external opponents, the actual forward capacity auctions have in fact generated submissions by multiple intermittent projects to sell into this control area's capacity market. As referenced in our prior comments, Suez has submitted multiple Canadian wind projects for participation in the current auction. Moreover, ISO-NE's November 6, 2007 FCA filing to the FERC similarly confirmed that Emera Energy Services requested that its Cape Bretton Wind Farm be qualified for the first FCA in the amount of 150 mw, to be imported over the New Brunswick interface, a demonstration that it stood willing and able to supply intermittent capacity into this control area. <u>Id</u>. at 26. The ISO report on the first FCA similarly referenced the submittals for 641 mw of Erie Boulevard Hydro Power imports, which we are advised included substantial amounts of run-of-river intermittent capacity. <u>Id</u>. at 8. Thus, the actions of external generators actively seeking to participate in the New England capacity markets serves to undermine the ability of the same parties to credibly maintain that any such participation would in fact be "not feasible."

III. <u>Section 105 (c) Would Not Violate The Commerce Clause.</u>

As an initial matter, none of the Comments rebut our initial position that the Department is not an appropriate forum to adjudicate the constitutionality of the statute adopted by the Legislature. See, Initial Comments, at n.1, siting the recent decision of <u>Maher v. Justices of Quincy Div. of District Court</u>, 67 Mass. App. Ct. 612, 618 (2006) ("It is for the courts, not administrative agencies, to decide the constitutionality of statutes"). We thereby reiterate our recommendation that the Department limit its consideration to the practical feasibility of Section, a matter well within its expertise.

In any event, none of the Commerce Clause authorities raised by the opponents of Section 105 are on point. In particular, none cite to or reconcile the leading case in this jurisdiction, Grant's Dairy v. Comm. of Maine Dept. of Atr., Food & Rural Resources, 232 F.3d 8 (1st Cir. 2000), which upheld a state-initiated program establishing a price incentive applicable only to in-state sales of in-state milk, but with no allowance for any imported milk to qualify for the program. Indeed, the First Circuit in such decision distinguished the line of cases upon which the opponents now rely, distinguishing the West Lynn Creamery, New Energy, and Philadelphia v. New Jersey cases. While acknowledging the often-cited provisions of such precedents, the court distinguished the state-initiated incentive program because it imposed no barriers to inter-state commerce by regulating or restraining the sales of imported products, restricting the sales of domestic product out-of-state, or regulating the price at which domestic product is sold elsewhere. Id. at 22-23, citing Maine Milk. Comm'n v. Cumberland Farms Northern, Inc., 160 Me. 366 (1964) (finding that Maine's milk price regulation does not offend the Commerce Clause because it "does not attempt to control the price paid per milk purchased outside of Maine, or the sales price outside the state of milk produced here").

The Grant's Dairy court went on to further distinguish cases cited by the opponents dealing with state measures the either prohibit commerce by export or import of out-of-state or in-state resources, as follows:

> The cases Grant cites in connection with its resource-hoarding claim are inapposite. Those cases concern situations in which a state either has blocked out-of-staters' access to an in-state resources, *e.g., Philadelphia v. New Jersey*, 437 U.S. 617, 628, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978), or has taken an affirmative step to prevent the export of a state resource, *e.g., H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 528-29, 69 S.Ct. 657, 93 L.Ed. 865 (1949). The Maine Milk Commission Act contains no such vice. It neither erects barriers to access nor inhibits exports.

Id. at. 23 (emphasis added.) In this regard, the case of New England Power Co. v. New Hampshire, 455 U.S. 331 (1982), which struck down a prohibition on energy exports, is similarly not on point, since the RPS would prohibit neither imports nor exports.

Several parties also cite to the case of New Energy Company of Indiana v. Limbach, 486 U.S. 269 (1988), which struck down a state sales tax on ethanol sold within Ohio, with beneficial tax credits only for products produced domestically or in states with reciprocal systems. Again, the case is not on point. In fact, the Grant's Dairy court acknowledged and the distinguished the rule of the New Energy decision, and rejected the appellant's attempts to demonstrate "that Maine's minimum pricing trips this wire." Id. at 15. Further, it is critical to note that the measure struck down in New Energy defined eligibility by reference to state borders, rather than, as in the present case, the non-political borders of a control area defined by entirely operational criteria. The New Energy court also drew the important distinction that the disallowed provisions were in the form a discriminatory tax upon all products sold within the state, rather than a program of affirmative incentive of the type now under consideration:

> The Commerce Clause does not prohibit all state action and does not to give its residents an advantage in the market place, but only action of that description in connection with the states regulation of interstate commerce. Direct substantiation of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufactures does.

New Energy, 486 U.S. at 278 (emphasis added).

The cited case of Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977), is also not on point. As an initial matter, the case pre-dates the Grant's Dairy case by 13 years, and thus does not undermine the holding of First Circuit. Further, the case involved a burden on interstate commerce in the form of a prohibition of product labeling, rather than the entirely positive incentives of the state RPS initiative under consideration. The Hughes court also noted that the prohibition in that case would create "a marketing problem of potentially nationwide significance" by imposing a state-initiated requirement on the physical specifications of interstate shipping containers (Id. at 340), a concern not present here. Finally, the state prohibition in Hughes did not, as in the present case, advance legitimate reliability concerns in the uniquely-locational area of electrical reliability, which is long-recognized as the primary responsibility of the states.

In sum, none of the commenters have cited authority that invalidated state-initiated incentive programs in a context comparable to the current situation. Unlike the invalid state prohibitions in New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) and Philadelphia v. New Jersey, 437 U.S. 617 (1978), Section 105 in no way prohibits either the export or import of any renewable energy product, but merely provides conditions to the external participation in affirmative incentive and subsidy programs. Other cited authorities, including Wyoming v. Oklahoma, 502 U.S. 437 (1992), are similarly distinguished. As an initial matter, the case predates the Grant's decision by nearly a decade. Further, in contrast to the present case, the provision in Wyoming limited the state of origin of fuel sources delivered via the rolling stock of interstate common carriers. In contrast, Section 105(c) defines eligibility to receive REC incentives not by state borders, but by the well-defined operational limits of our electrical control area and, moreover, its provisions relate to the physical location of utility infrastructure facilities, a matter traditionally left to the states and entirely unrelated to concerns regarding fuels in transit by rail or highway.

Importantly, none of the commenters have suggested how their expansive reading of the Commerce Clause could be limited so as to allow traditional state functions to continue. For example, virtually all state RPSs (including the New York RPS, as discussed above) discriminate as to eligibility based upon location, and states have routinely reviewed the reliability implications of utility supply plans (including both internal versus imported resource options) and, more recently, have initiated location-specific RFPs for needed generation facilities, such as that recently undertaken by the state of Connecticut for in-state resources. It is thus impractical for commenters to advance a radical expansion of Commerce Clause limitations that could effectively disrupt many state incentive programs and preclude much of the traditional state oversight of the uniquely-locational aspects of utility infrastructure and reliability.

While we thus maintain the Section 105 does not impermissibly burden interstate commerce, to the extent of any remaining concern, or if the Department wishes to mitigate cited concerns arising from "Capacity Resource" status as defined in the ISO-NE Market Rules (but notably not defined in the provisions of Section 105), we have proposed an alternative interpretation and means of implementation at page 13 of our Initial Comments. Namely, the Department should avoid any of such concerns by interpreting the Legislature's call for greater reliability/capacity commitment from participating imports by requiring (i) that generators agree to sell their energy to this control area when needed, and (ii) that they make no contrary commitments of capacity to other control areas. We note in this regard the convergence with the suggestion of First Wind that reliability commitment be assured through the commitment to supply energy on a long-term basis; the essential difference in our proposal would be to also require that there be no inconsistent commitment of the capacity that would preclude the reliable supply such energy to this control area. Further, any transitional concerns can be met with reasonable grandfathering provisions, as various parties suggest.

IV. Implementation of Netting Restrictions is "Feasible."

For reasons stated in our Initial Comments, there is no reason that the Department may not implement the Legislative initiates of Section 105(e) in a manner that is both workable and feasible. As previously referenced, the Department could utilize existing definitions and narrowly focus the provision to net only exports for the account of, and delivered to, the party claiming REC credit. The Department could further limit administrative burdens through appropriate self certification, with recourse to documentation only when further inquiry is deemed appropriate. Although such a regime may not be as precise as possible, it would certainly further the concern recognized by the Legislature in a manner that is entirely feasible.

V. Conclusion.

For the foregoing reasons, CWA respectfully requests that the Department finds that implementation of Section 105 is feasible and allow such provisions to go into effect as soon as possible, so as to remedy policy concerns that have be recognized by the Legislature.

Sincerely,

Dennis J. Duffy

Dennis J. Duffy
Vice President – Regulatory Affairs